

Points and Vectors

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The new leader of Angela Merkel's Christian Democratic Union (CDU), Annegret Kramp-Karrenbauer, has made an announcement this week that caused quite a stir in Germany: The CDU chairwoman, usually referred to as AKK for obvious reasons of convenience, said that her party would in the future consider closing the borders for refugees as a measure of last resort – an "*ultima ratio*", as she put it. That appeared to some as the feverishly anticipated rebuff to her predecessor's open border policy of 2015/16. I'm not even sure it was, though. Merkel and her Home Secretary Thomas de Maizière hadn't believed for a moment during the refugee crisis that rejecting refugees at the border was categorically forbidden. There is always Article 72 TFEU which provides for a sort of emergency stop with regard to the Dublin and Schengen obligations if these become untenable "with regard to the maintenance of law and order and the safeguarding of internal security". Merkel and her government could and would certainly have made use of that backstop in 2015/16 if they had considered the final blow this would undoubtedly have delivered to the Dublin system proportionate to the emergency they were facing. Which they didn't (quite rightly, in my opinion).



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Still, AKK's use of the term *ultima ratio* makes me feel queasy. *Ultima ratio*, the last reason: that is a peculiar figure of argumentation. "*Ultima ratio regis*" was what Frederick the Second, King of Prussia, had his foundries adorn his bronze cannons with in the year of 1742, following Cardinal Richelieu's example from the Thirty Years' War. A characteristically ambiguous phrase: The enlightened monarch's ultimate argument which applies only when all others fail, would be one way to read it. The absolute ruler's supreme reason before which all demands for justification must remain silent, another. Either way, it's clear what it is referring to: a piece of artillery to shoot people dead with.

Invoking *ultima ratio* is a way of limiting and legitimizing one's action at the same time. The word marks an end of the road, a point beyond which an abyss yawns, *usque huc venies non procedes amplius*. A point, however, which for the same reason is still accessible. The *ultima ratio* is an option, the ultimate one, but nevertheless – and a peculiarly attractive one at that. It exerts a certain adventurous pull, this ultimate point at the far end of the road, not unlike the crave for that one last, irresistibly fragrant cigarette before quitting smoking for good.

The ultimate lure

The addictive lure of that ultimate point of necessity and emergency has been a constant overtone to the refugee crisis debate in 2015/16 in Germany, with all those force-of-nature metaphors of streams, floods and avalanches, and AKK's *ultima ratio* talk seems to pluck some of these strings, too. I wonder, though, if Article 72 TFEU would satisfy the Christian Democrats' crave in the event of another big-time refugee crisis. This norm allows to depart from the provisions of Title V of the Treaty on the Functioning of the European Union, relating to the 'area of freedom, security and justice', on which the common border and asylum regime in the EU is based. But there are other legal ties to which a member state with a refugee crisis at its hands would remain subject, as [Dana Schmalz](#) has argued here on Verfassungsblog: the ECHR, the Geneva Convention on Refugees, the ban on collective deportation and indirect *refoulement* would still be in place. What then to do in the ultimate hour of need? What would it take to break free of those ties? The *ultima ultima ratio*?

++++A Note from the University of Aberdeen++++

Political Concepts in the World –The University of Aberdeen, in collaboration with the Horizon 2020 Marie Skłodowska-Curie programme, is offering six Early Stage Researcher positions, lasting 3 years commencing September 2019, for ground-breaking research on how political concepts are used in the world.

ESRs will propose and develop their own research projects around the theme of how political concepts and their impact.

The application deadline is 5 March 2019. Indicative topics and how to apply are detailed in the [Further Particulars](#).

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The *ultima ratio* may not even be a fixed point but rather a vector: It is not just a place, it is a direction. It points out into the extreme. Into the unbound. Beyond the law.

This is a direction which a conservative-liberal party like the CDU, whose chief concern is the maintenance of law and order, should avoid at all cost. It does not suit them, it does not become them, and it does not do them any good. The CDU, in the seven decades of its existence, knew and abode by that most of the time (in that respect, very much unlike their Bavarian sister party CSU). That's what kept them

in governance for such a long time. Now, there is AKK at the helm. I do hope she doesn't forget.

State of emergency

In the **US**, President Trump has been making no secret of the fact that the extreme and the unbound is exactly the direction he intends to take his country to, using the power conferred on him by the Constitution, and then some. Unfortunately, his constitutional competences also include the power to declare a national state of emergency, *de facto* even in the absence of any actual emergency save the fact that Congress won't allow him the money he wants to build that bloody wall of his with. [JUD MATHEWS](#) explains the constitutional background. And [KIM SCHEPPELE](#) shows that, while the declaration of emergency is most likely unconstitutional, there is hardly anything that can be done about it, politically or legally – which tells us a lot about the woeful state of the US constitution.

In **Spain**, there is hardly less at stake in terms of democracy and cohesion of the constitutional state right now. According to [JOAQUÍN URÍAS](#), the criminal trial against the leaders of the Catalan independence movement, indicted for "rebellion" and facing decades in jail, puts democracy in the kingdom under an ordeal unequalled since the end of the Franco dictatorship.

When the **UK** leaves the EU, Eleanor Sharpston will have to quit her job in Luxembourg, too. The Advocate General at the European Court of Justice has done more than almost any other to further the development of European asylum law during and after the years of the refugee crisis, and [DANA SCHMALZ](#)'s post pays ample tribute to her merits.

+++++++ A Note from EUI/WZB/LSE +++++++

*The European University Institute, the WZB Berlin Social Science Center, and the London School of Economics and Political Science invite submissions for the second annual **European Junior Faculty Forum for Public Law and Jurisprudence** to be held at the the London School of Economics and Political Science on June 10-11, 2019.*

The complete Call for Papers for the 2018 European Junior Faculty Forum for Public Law and Jurisprudence is available here: www.wzb.eu/ejff

The deadline for submission is April 7, 2019. Decisions will be sent by April 29, 2019.

General questions about the European Junior Faculty Forum for Public Law and Jurisprudence should be sent to ejff@wzb.eu.

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In **Germany**, Federal Interior Minister Seehofer has triggered a discussion about the civil servants being party members in general and AfD members in particular.

[JOSEF FRANZ LINDNER](#) sheds light on the constitutional and civil service law background of that debate.

In **Austria**, as in Germany, there is a right to a third option in addition to female/male. [PETRA SUSSNER](#) reports how the FPÖ-led Ministry of the Interior undermines that right.

The **German** Federal Labour Court has referred questions to the ECJ on the headscarf ban at the workplace, which, according to [SHINO IBOLD](#), might result in a lowering of the relatively high German level of protection.

A European topic of tremendous relevance is the screening of investments by which foreign governments like China's can gain influence on strategic industries within the **EU**. Together with [STEFFEN HINDELANG](#) and [ANDREAS MOBERG](#), we have organized an [online symposium](#) discussing the scope for this provided by EU law, with contributions from [THOMAS PAPADOPOULOS](#), [PHILIPP STOMPFE](#), [DOMINIK EISENHUT](#), [TEOMAN HAGEMEYER](#), [JOANNA WARCHOL](#), [MAVLUDA SATTOROVA](#), [AGE BAKKER](#), [STEFAN KORTE](#) and [SVEN SIMON](#).

Elsewhere

[OLIVER GARNER](#) despairs over the Brexit-induced, but actually unnecessary withdrawal of the **UK** from the European University Institute (EUI).

[IMACULADA RAMOS TAPIA](#) and [AGUSTÍN RUIZ ROBLEDO](#) explain under constitutional and criminal law whether and by what acts the Catalan secessionists accused in the "trial of the century" in **Spain** have made themselves liable to prosecution.

[IGNACIO GARCÍA VITORIA](#) investigates whether the ECtHR ruling of last November on the rights of the imprisoned Turkish opposition politician Selahattin Demirtaş may be beneficial to the **Catalan** defendants.

[ALBERTO ALEMANN](#) sees Europe as a winner in this week's diplomatic clash between **France and Italy**.

[JOSEPH WEILER](#) reveals what his EU "dream team" would look like after the European elections.

[PETRA BÁRD](#) recapitulates the drama of the Central European University being forced into exile by the **Hungarian** government.

[MAIRA SEELEY](#) makes proposals how to alleviate the impoverishment and prevent the radicalisation of Syrian refugees in **Jordan and Lebanon**.

[ABDURRACHMAN SATRIO](#) sees **Indonesia** under President Joko Widodo in democratic retrogression.

That's all for this week. All the best, and take care,

